NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Caucus Attorneys' Representation of Legislators before the Office of State Ethics

DATE: March 20, 2008

INTRODUCTION

The Citizen's Ethics Advisory Board ("Board") issues this advisory opinion at the request of Morgan O'Brien,[1] legal counsel to the Senate Republicans, who inquires as to whether, and if so under what circumstances, caucus attorneys may appear before the Office of State Ethics on behalf of members of the General Assembly.

RELEVANT FACTS

In his inquiry, Attorney O'Brien presents the following scenario:

> Upon receipt of a notice from the [Office of State Ethics] that a complaint has been filed, the legislator/respondent will usually consult with caucus counsel. From that point, if requested by the legislator, I would consider it well within the scope of my powers and duties as counsel to contact the . . . enforcement officer handling the complaint, inform them of my representation of the legislator and begin to discuss the complaint and the events giving rise to it. The purpose of such discussion would be to resolve the matter in the most advantageous way possible for my client. If the facts and law warranted such action (i.e., a settlement could not be reached), I would want to appear before the Board to submit memoranda and argue our position and, if need be, appeal the Board's decision to the superior court.[2]

QUESTIONS

The questions that we must answer are (1) whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an ethics enforcement action, and (2) whether a caucus attorney may do so concerning an informal staff letter or advisory opinion.

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[1]Attorney O'Brien has since retired from state service.

[2]Letter from Morgan O'Brien, legal counsel to the Senate Republicans, to Brian O'Dowd, assistant general counsel to the Office of State Ethics (November 5, 2007) (on file with the Office of State Ethics).

ANALYSIS

I

The first question is whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an ethics enforcement action.

As "public officials,"[3] legislators are subject to the Code, including § 1-84 (c),[4] its use-of-office provision, a violation of which requires two things: (1) a use of public office and (2) personal financial gain. The latter requirement—which "contemplates that the state servant is avoiding out-of-pocket expenses"[5]—is satisfied, for if a caucus attorney represents a legislator in an ethics enforcement action, the legislator need not secure private counsel at his or her own expense. As to the former requirement, the question is whether it is a "use of public office" for a legislator to use the legal services of a caucus attorney in regard to an ethics enforcement action.

Before answering that question, we address Attorney O'Brien's suggestion that this scenario presents a "gift"—as opposed to a "use-of-office"—issue. Specifically, he asserts that a caucus attorney's provision of legal services to a legislator with respect to an ethics enforcement action is permissible under one of the Code's gift exceptions, General Statutes § 1-79 (e) (15), which excepts from the definition of "gift" the following: "Anything of value provided by *an employer* of . . . a public official . . . to such official . . . provided such benefits are customarily and ordinarily provided to others in similar circumstances . . . ."[6] The legal services in question, according to Attorney O'Brien, "may fairly be characterized as provided by an employer (the state) to a public official."[7]

Whether the state of Connecticut is an "employer" for purposes of that gift exception was addressed by the former State Ethics Commission ("former Commission") in Advisory Opinion No. 97-25. In answering that question in the negative, the former Commission's analysis proceeded thus: the Code contains a ban on gifts from restricted donors; the gift ban's purpose is to reduce "outside" influences on state servants; therefore, this "gift exception . . . for gifts from an employer . . . applies only to those

[3]The term "public official" includes, among others, "any member or member-elect of the General Assembly . . . ." General Statutes § 1-79 (k).

[4]Section 1-84 (c) provides: "No public official or state employee shall wilfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of his official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child's spouse, parent, brother or sister or a business with which he is associated."

[5]Advisory Opinion No. 2000-20.

[6](Emphasis added.) General Statutes § 1-79 (e) (15).

[7]Letter from Morgan O'Brien, legal counsel to the Senate Republicans, to Brian O'Dowd, assistant general counsel to the Office of State Ethics (December 4, 2007) (on file with the Office of State Ethics).

restricted donors[8] . . . [that] employ the public official . . . ."[9] It went on to note that expenditures (including gift expenditures) made by a state entity for the benefit of state servants "are governed by rules established by the Department of Administrative Services and the Auditors of Public Accounts."[10] It also noted that "[i]mproper receipt of such expenditures by a state servant . . . may be deemed a use of one's state office or position for personal financial gain, in violation of . . . § 1-84 (c)."[11]

That brings us back to the initial question, namely, whether a legislator's receipt of a caucus attorney's legal services concerning an ethics enforcement action is a use of his or her state office. A January 2004 letter issued by the former Commission to then-Governor John Rowland suggests that it is.[12] There, the former Commission's executive director and general counsel Alan Plofsky sought to "publicly reiterate and memorialize" his prior agreements with the Governor's official and private attorneys as to the Governor's legal representation in complaint proceedings before the former Commission.[13] Under those agreements, Plofsky stated, "the publicly paid Governor's counsel would strictly limit their representation to the Office of the Governor as an institution; *while the Governor's private attorney would represent him regarding actual complaint proceedings, including any required hearings.*"[14] He explained: "This separation of duties was based on the parties' agreement that any further utilization of the Governor's Counsel in Ethics Commission enforcement proceedings would be an improper use of state resources."[15]

Two other states' ethics commissions tackled similar questions and concluded likewise. The Rhode Island Ethics Commission ("Rhode Island Commission") addressed whether it was an inappropriate use of office for a member of a state board who had been named a respondent in an ethics complaint to be represented by the board's legal counsel before the ethics commission and on appeals of its decisions.[16] According to the Rhode Island Commission, if a public official or employee takes some action that is prohibited by the ethics code, he or she is not acting in the state's interests and is not entitled to "representation by legal counsel paid for by the public body."[17] In fact, it continued, "[t]o accept such representation at the expense of the public body would be to use his or

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[8]That is, registered lobbyists and any persons the official or employee knows or has reason to know are (1) doing business with or seeking to do business with his or her department or agency, (2) engaged in activities directly regulated by such department or agency, or (3) prequalified under General Statutes § 4a-100. General Statutes § 1-84 (j) and (m).

[9]Advisory Opinion No. 97-25.

[10]Id.

[11]Id.

[12]Letter from Alan Plofsky, executive director and general counsel of the State Ethics Commission, to Ross Garber, legal counsel to the Office of the Governor (January 26, 2004) (on file with the Office of State Ethics).

[13]Id.

[14](Emphasis added.) Id.

[15]Id.

[16] Rhode Island Ethics Commission, General Commission Advisory Opinion No. 4 (November 17, 1988).

[17]Id.

her public office . . . to obtain financial gain . . . ."[18] The Rhode Island Commission concluded, therefore, that "representation of a member of a state board, commission or agency by legal counsel to such public body in any matter arising under the . . . Code of Ethics would be improper . . . ."[19] However, it noted, nothing would "prevent the public body from electing to reimburse any individual for his or her legal expenses *if the Commission finds that no violation has been committed.*"[20]

Similarly, in an "Advice of Counsel," an opinion issued by the chief counsel to the State Ethics Commission in Pennsylvania, the chief counsel addressed whether Pennsylvania's use-of-office provision[21] prohibited a township supervisor from using the township-paid solicitor to represent him with respect to its investigation as to whether he had improperly accepted gifts from contractors.[22] From Pennsylvania state-court precedent, the chief counsel gleaned the following: a public official found to have engaged in misconduct is not entitled to a public defense; otherwise, a public official is entitled to publicly paid legal representation as to official, rather than personal, conduct.[23] The dilemma, according to the chief counsel, is that

> *it would be difficult if not impossible to predict in advance whether a public official under investigation by the State Ethics Commission would ultimately be entitled to have his legal representation paid by his governmental body.* Meanwhile, any use of office or the authority of office by the public official to secure or accept publicly paid legal representation to which he was not entitled would violate [the use-of-office provision.][24]

His solution was for the township supervisor to refrain from securing or even accepting township-paid representation pending the case's outcome; and if, based on that outcome, the township supervisor was found not to have improperly accepted gifts from contractors, he could then seek to recover attorneys' fees.[25]

Thus, both the Rhode Island opinion and the Pennsylvania opinion recognize (the former implicitly, the latter explicitly) three things: first, the subject of an ethics enforcement action who is innocent of the accusations is entitled to publicly paid legal representation; second, the subject of an ethics enforcement action who is guilty of the accusations is not entitled to publicly paid legal representation; and third, it is practically

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[18]Id.

[19]Id.

[20](Emphasis added.) Id.

[21] Under Pennsylvania's use-of-office provision—which is similar to Connecticut's—"a public official/public employee is prohibited from using the authority of public office/employment or confidential information received by holding such a public position for the private pecuniary benefit of the public official/public employee himself, any member of his immediate family, or a business with which he or a member of his immediate family is associated." Pennsylvania State Ethics Commission, Advice of Counsel (December 2, 1994).

[22]Pennsylvania State Ethics Commission, Advice of Counsel (December 2, 1994).

[23]Id.

[24](Emphasis added.) Id.

[25]Id.

impossible to predict in advance whether the subject of an ethics enforcement action is innocent of the accusations and thus entitled to publicly paid legal representation. The solution—according to both opinions—is to have the state reimburse the individual's legal expenses *only after* a commission finding that he or she did not violate the ethics code.

In Connecticut, General Statutes § 1-82 (c), the Code's attorneys' fees provision, represents, essentially, a codification of that solution. That is, § 1-82 (c) authorizes reimbursement—as opposed to prepayment—of attorneys' fees, and then *only after* one of three events occurs:

> **[1]** If a judge trial referee finds, after a hearing pursuant to this section, that there is no probable cause to believe that a public official or state employee has violated a provision of this part or section 1-101nn, or **[2]** if the [Citizen's Ethics Advisory Board] determines that a public official or state employee has not violated any such provision, or **[3]** if a court of competent jurisdiction overturns a finding by the board of a violation by such a respondent . . . .[26]

The basic assumption underlying § 1-82 (c) is that, until one of those three triggering events occurs, the subject of an ethics enforcement action is not entitled to publicly paid legal representation—which is something a legislator already would have received if he or she had used the legal services of a caucus attorney.

That assumption finds support in the "Report to the General Assembly by the Codes of Ethics Study Committee," which became the basis for the 1983 legislative changes to the Code, one of which was the addition of what is now § 1-82 (c), the Code's attorneys' fees provision.[27] In that report, the committee—which the legislature created by way of Public Acts 1982, No. 82-423—discussed three scenarios:

- Scenario One: When a complaint is made with knowledge that it is without foundation in fact. The committee explained that, in this case, "the respondent [already] has a cause of action for double damages [against the complainant], plus court costs and reasonable attorneys' fees."[28]

- Scenario Two: When a respondent is guilty of the accusations in the complaint. In this instance, the respondent should, according to the

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[26]Section 1-80 (c) goes on: "If any complaint brought under the provisions of this part or section 1-101nn is made with the knowledge that it is made without foundation in fact, the respondent shall have a cause of action against the complainant for double the amount of damage caused thereby and if the respondent prevails in such action, he may be awarded by the court the costs of such action together with reasonable attorneys' fees."

[27]See Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.8.

[28]Id.

committee, pay the costs of his or her own defense, as it is "not part of his official duties to violate the Code."[29]

- Scenario Three: When a respondent is "innocent" of the accusations in the complaint. The committee believed that, in this case, "the costs of his defense should be borne by the State as expenses incurred in the performance of duty."[30]

The committee immediately thereafter noted that "this right"—namely, the right of an "innocent" respondent to have the state bear the costs of his or her defense—"should be spelled out in the Code . . . ."[31] Which begs the question: at what point is a respondent deemed "innocent" for purposes of having the state bear the costs of his or her defense? We find the committee's answer to that question in the language that it suggested should be—and that, incidentally, was in fact—spelled out by the legislature in the Code:

> The Code . . . should be amended to provide that **[1]** if the Commission finds, after a hearing pursuant to Conn. Gen. Stat. § 1-82 (a) that there is not probable cause to believe that a respondent who is a public official or State employee has violated the Code, or **[2]** finds after a hearing pursuant to Conn. Gen. Stat. § 1-82 (c) that a respondent who is a public official or State employee has not violated the Code, the State shall pay the reasonable legal expenses of the respondent. **[3]** In addition, the State should pay these expenses if a Commission finding of violation is overturned on judicial review.[32]

Thus, in the committee's view, a respondent is deemed "innocent" for purposes of having the state bear the costs of his defense *only after* one of those three triggering events occurs. The implication is that, until then, a respondent is not entitled to have the state bear the costs of his or her defense.

The former Commission said as much in a 1989 declaratory ruling.[33] The facts there involved a prior ethics enforcement action against Representative Vito Mazza in which the former Commission found that there was probable cause to believe that he had violated the Code.[34] Representative Mazza eventually agreed to a negotiated settlement of the matter, after which his private counsel, James A. Wade, asked whether it was permissible for Representative Mazza to solicit funds to defray legal expenses he incurred while defending himself.[35] In the process of answering that question, the former

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[29]Id.
[30]Id.
[31]Id.
[32]Id.
[33]See In the Matter of a Request for a Declaratory Ruling, James A. Wade, Esq., Applicant, September 11, 1989.
[34]Id.
[35]Id. The legislature has since enacted a specific method by which a public official or state employee may establish a legal defense fund. See General Statutes § 1-86d.

Commission explained that, in accordance with § 1-82 (c), "[i]f Representative Mazza had been exonerated at any stage of the proceedings, he would have been reimbursed by the State for his reasonable legal expenses."[36] (By citing to § 1-82 (c), the former Commission meant by "exonerated" that one of the three triggering events in that provision had occurred.) However, it noted: "Since he was not exonerated, he is not entitled to any state payment of his legal fees."[37]

In light of the preceding, we are left with this. A legislator is entitled to have the state bear the costs of his or her defense in an ethics enforcement action *only after* he or she is (in the words of the former Commission) "exonerated" or (in the words of the Codes of Ethics Study Committee) "innocent." A legislator is deemed "exonerated" or "innocent" for that purpose *only after*

1. a judge trial referee finds that there is no probable cause to believe that the legislator has violated the Code;

2. the Citizen's Ethics Advisory Board determines that the legislator has not violated the Code; or

3. a court of competent jurisdiction overturns a finding by the board of a violation by the legislator.

Until then, a legislator is not entitled to publicly paid legal representation—which is something he or she already would have received by using the legal services of a caucus attorney. To accept such representation, we conclude, would be an improper use of his or her office in violation of § 1-84 (c).

Accordingly, in answer to the question posed, a caucus attorney may not represent a legislator before the Office of State Ethics concerning an ethics enforcement action.[38]

II

The remaining question is whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion.

As with the previous question, the relevant provision here is § 1-84 (c), which prohibits a legislator from (1) using his or her office for (2) personal financial gain. Again, the latter requirement (i.e., personal financial gain) is satisfied, for if a caucus

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[36]In the Matter of a Request for a Declaratory Ruling, James A. Wade, Esq., Applicant, September 11, 1989.

[37]Id.

[38]The current practice of the enforcement division allows any subject of an evaluation or complaint to be accompanied to any informal meeting by any individual who the respondent or subject feels will assist him or her in understanding the enforcement process and/or the allegations against him or her. This opinion does not purport to address this practice of the enforcement division—which remains intact—except insofar as the attendance of any individual constitutes legal representation (as defined by Practice Book § 2-44A) that is financed by the state.

attorney represents a legislator in regard to an informal staff letter or advisory opinion, the legislator need not secure private counsel at his or her own expense. That leaves the issue of whether it is a "use of public office" for a legislator to be represented by a caucus attorney concerning an informal staff letter or advisory opinion.

Because this question has not been addressed by way of advisory opinion, we look for guidance to a somewhat similar scenario addressed by the Massachusetts State Ethics Commission ("Massachusetts Commission"). Specifically, it addressed whether legal counsel for the chairman of a legislative committee could file a lawsuit on behalf of the committee chairman, other committee members, and their employees, "in their private capacity as residents of the Commonwealth, challenging a law which would affect them as private individuals."[39] According to the Massachusetts Commission, the responsibilities of the attorney, a legislative employee, could reasonably include representing individuals in their capacity as legislators (for example, challenging a particular law as it affects legislators in their official capacity), but could not include filing the lawsuit in question, as it would affect them not in their official but rather in their private capacity.[40]

What emerges from that decision is this: a legislative attorney may represent a legislator in the legislator's official capacity, but may not do so with respect to the legislator's private capacity. We agree, believing it to be an inappropriate use of office for a caucus attorney to represent a legislator in his or her private—as opposed to official—capacity. For example, a legislator most certainly may not use the legal services of a caucus attorney to file the legislator's state income taxes, to handle the closing on the legislator's home, or to represent the legislator in connection with a probate matter.

That said, the question is whether, in representing a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion, a caucus attorney is representing the legislator in his or her private or official capacity. We believe it is the latter, for when a legislator seeks clarification of the Code in an informal staff letter or advisory opinion, he or she is doing so not as a private citizen but rather as a public official. Indeed, the only reason for making such a request is the fact that the legislator is a public official and, therefore, subject to the Code.

It may be argued that this determination is inconsistent with the conclusion reached above, in that legislators are subject to ethics enforcement actions also solely by virtue of their official positions. However, when a legislator violates the Code, he or she is not acting within the scope of his or her official capacity. As explained in the "Report to the General Assembly by the Codes of Ethics Study Committee," it is never part of one's "official duties to violate the Code."[41] Further, although (as discussed above) there is an assumption underlying the Code that the subject of an ethics enforcement action is

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[39]EC-COI-92-29, discussing EC-COI-83-137.

[40]Id.

[41]Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.8

not entitled to publicly paid legal representation until one of the three triggering events in § 1-82 (c) has occurred, there is no corresponding assumption with respect to those who ask for informal staff letters and advisory opinions.

That being the case, we conclude that § 1-84 (c) does not prohibit a caucus attorney from representing a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion.

This conclusion appears to be consistent with the position taken by the former Commission. In December 2003, while a complaint was pending against then-Governor John Rowland, a legislator requested an advisory opinion applying one of the Code's gift provisions to the Governor.[42] Subsequent to that request, Ross H. Garber, legal counsel to the Office of the Governor, submitted a letter to the former Commission's executive director and general counsel, setting forth the respective roles of the Governor's official and private attorneys.[43] He stated:

> With respect to the advisory opinion sought by [the legislator], I believe this involves official issues and also implicates personal interests of the Governor. In his petition, [the legislator] seeks the Commission's interpretation of the state gift laws as they apply to a Governor of Connecticut, including Governor Rowland and any future occupant of the Office of the Governor. *Accordingly, I will be representing the Office of the Governor and Governor Rowland in his official capacity in proceedings related to this request for an advisory opinion.* Nevertheless, given that any decision on the request for an advisory opinion might impact the Commission's decision on the complaint filed [against the Governor], which in turn might result in a monetary fine assessed against the Governor, the Governor's private counsel will also address the Commission.[44]

In his response, the former Commission's executive director and general counsel noted that Attorney Garber's "description of this separation of duties comports with our prior understanding."[45]

For clarity's sake, we believe that, when a caucus attorney represents a legislator concerning an informal staff letter or advisory opinion, he or she should, as did Attorney

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[42]Letter from James A. Amann, Majority Leader of the House of Representatives, to Alan Plofsky, Executive Director and General Counsel of the State Ethics Commission (December 18, 2003) (on file with the Office of State Ethics).

[43] Letter from Ross H. Garber, legal counsel to the Office of the Governor, to Alan Plofsky, executive director and general counsel of the State Ethics Commission (January 28, 2004) (on file with the Office of State Ethics).

[44](Emphasis added.) Id.

[45] Letter from Alan Plofsky, executive director and general counsel of the State Ethics Commission, to Ross Garber, legal counsel to the Office of the Governor (January 29, 2004) (on file with the Office of State Ethics).

Garber, disclose to the Office of State Ethics precisely on whose behalf and in what capacity he or she is appearing.

We finish by noting that the Code expressly authorizes any person subject to its provisions to petition the Board for an advisory opinion,[46] even if the subject of the request "is not the petitioner (e.g., when a department head requests an advisory opinion regarding an employee of the department) . . . ."[47] Pursuant to state regulations, the petition "shall be accompanied by a statement of any facts and arguments that support the position of the person making the inquiry."[48] Further, the Board "may receive and consider facts, arguments and opinions from persons other than the petitioner."[49] Thus, for example, as the law now stands, the following holds true:

- If a caucus attorney is informed that a legislator is contemplating a particular outside employment opportunity, he or she may, without having been consulted by the legislator, petition the Board to address the matter and provide any arguments in support of his or her position.

- If the leadership of a caucus is informed that a legislator is contemplating a specific outside employment opportunity, it may, without having been consulted by the legislator, petition the Board to address the matter and use its caucus attorneys to provide any arguments in support of its position.

- If a legislator asks the Board whether his or her proposed outside employment is permissible under the Code, a caucus attorney may, without having been asked to do so by the legislator, submit any arguments or opinions concerning the matter.

In other words, one way or another the Code and its interpretive regulations would permit caucus attorneys to present legal arguments concerning the legislator's proposed outside employment.

CONCLUSION

It is the opinion of the Citizen's Ethics Advisory Board that § 1-84 (c) prohibits a caucus attorney from representing a legislator with respect to an ethics enforcement action, but does not prohibit a caucus attorney from representing a legislator with respect to an informal staff letter or advisory opinion.[50]

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[46]General Statutes § 1-81 (a) (3).

[47]Regs., Conn. State Agencies § 1-92-39 (a).

[48]Regs., Conn. State Agencies § 1-92-38.

[49]Regs., Conn. State Agencies § 1-92-39 (a).

[50]This advisory opinion addresses only the Code of Ethics for Public Officials and its interpretive regulations and advisory opinions; it does not purport to address the applicability of any other statute, regulation, etc. Specifically, it does not address the applicability of the Rules of Professional Conduct.